(1)

No. 97-843

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AURELIA DAVIS, as next friend of LASHONDA D.,
Petitioner,

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

SUPPLEMENTAL BRIEF

MARCIA D. GREENBERGER
VERNA L. WILLIAMS *
NEENA K. CHAUDHRY
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180
Attorneys for Petitioner
* Counsel of Record

August 7, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

CASES	Page
Bruneau v. South Kortright Sch. Dist., 962 F. Supp. 301 (N.D.N.Y. 1997)	4
Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949 (4th Cir. 1997)	4
Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998)	4
Cannon v. University of Chicago, 441 U.S. 677 (1979)	3
Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997)	3, 4
Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998)	3, 4
Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998)	4
Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992)	*passim*
Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998)	*passim*
Linson v. University of Pennsylvania, 1996 WL 637810 (E.D. Pa. 1996)	4
Murrel v. School District No. 1, No. 95-CV2882 (D. Colo. 1997)	4
Oncale v. Sundowner Offshore Servs., 118 S. Ct. 998 (1998)	4
Oona, R.S. v. McCaffrey, 143 F.3d 473 (9th Cir. 1998)	3, 4
Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996)	4
STATUTES	
20 U.S.C. § 1681	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-843

AURELIA DAVIS, as next friend of LASHONDA D.,
Petitioner,

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

SUPPLEMENTAL BRIEF

This Court's recent decision in *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), leaves unresolved the two questions presented in the Petition for Writ of Certiorari and underscores the importance of Supreme Court review of this case. First, *Gebser* does not resolve the issues raised in *Davis*, for it does not address whether student-to-student harassment can constitute a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, or the principles for determining when such a violation occurs. Rather, moving beyond the issue resolved in *Franklin v. Gwinnett*

County Public Schools, 503 U.S. 60 (1992)—that teacher-student harassment can constitute a Title IX violation—*Gebser* focuses on the standard for the availability of damages in a Title IX private action for teacher-student sexual harassment. Second, the *Gebser* analysis underscores that the approach taken by the Eleventh Circuit was erroneous, further highlighting the need for clarity on this most important issue of Title IX coverage, clarity which only this Court can provide. Finally, the continuing split among the federal circuit courts on the issue, which promises to become exacerbated as additional cases proceed through the lower courts, strongly supports prompt resolution by this Court of whether Title IX supports claims of student-to-student harassment. Clear guidance from this Court is essential to ensure that schools understand their obligations under the law, that students and their parents understand the legal protections available, and that the government agencies charged with enforcing Title IX understand the scope of their authority.

1. *Gebser* does not resolve the important question of whether student-to-student sexual harassment is actionable under Title IX. The Court held that damages may be recovered in a teacher-student sexual harassment case only if "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Gebser*, 118 S. Ct. at 1993. *Gebser* builds upon this Court's ruling in *Franklin*, which holds that Title IX recognizes a claim for teacher-student sexual harassment. However, since both cases only deal explicitly with sexual harassment in the teacher-student context, neither squarely addresses the issue of whether Title IX recognizes a claim for student-to-student harassment. Lower court confusion about the application of the *Franklin* analysis to student-to-student sexual harassment will not be cured by *Gebser*.

2. In addition, *Gebser* underscores the fact that the decision below is based on a flawed analysis of Title IX

and the importance of providing clarity on the issues raised in this case. *Davis* forecloses a cause of action for peer harassment, similarly foreclosing any remedy, including equitable relief, for a school's failure to address such harassment under all circumstances. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*). In so holding, the Eleventh Circuit misread the Spending Clause[1] to require Congress to provide recipients with an explicit description of all forms of sex discrimination prohibited by Title IX. Under *Gebser*, Title IX mandates actual notice to a recipient of the alleged violation and an opportunity to remedy it before it may be held liable for damages. *Gebser* does not require, any more than *Franklin* did, that Congress explicitly address sexual harassment at all, let alone teacher-student or any other type of harassment in order that it be prohibited by Title IX. *Gebser*, 118 S. Ct. at 1998. Guidance by this Court is essential to ensure that other courts do not similarly misinterpret this Court's holdings regarding the type of notice required under Title IX.

3. The ongoing split among the federal courts of appeal on peer sexual harassment cases, which likely will become exacerbated as additional cases proceed through the lower courts, further emphasizes the need for this Court to resolve this issue. As the Petition demonstrates, the Ninth and Seventh Circuits recognize that peer hostile environment sexual harassment can violate Title IX. *See Oona, R.S. v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997), *withdrawn, superseded, and amended on denial of reh'g by* 143 F.3d 473, 476 (9th Cir. 1998) (holding that at time of conduct in question, school officials had clearly established duty under Title IX to remedy known student-to-

---

[1] As the Petitioner stated in her August 16, 1998 Supplemental Brief, there is authority for holding that Title IX was enacted pursuant to Congress' authority under Section 5 of the Fourteenth Amendment, as well as the Spending Clause. *See Doe v. University of Illinois*, 138 F.3d 653, 657-60 (7th Cir. 1998); *see also Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

student sexual harassment), *and petition for cert. filed,* 67 U.S.L.W. 3083 (U.S. June 19, 1998) (No. 98-101); *Doe v. University of Illinois,* 138 F.3d 653 (7th Cir. 1998), *petition for cert. filed,* 67 U.S.L.W. 3083 (U.S. July 13, 1998) (No. 98-126). The Fourth Circuit also had aligned itself with these circuits; however, it has vacated that decision and reheard the case *en banc. Brzonkala v. Virginia Polytechnic Inst. and State Univ.,* 132 F.3d 949 (4th Cir. 1997), *vacated and reh'g en banc granted,* No. 96-1814 (4th Cir. Feb. 5, 1998). These decisions stand in sharp contrast to those of the Fifth and Eleventh Circuits. *See Rowinsky v. Bryan Indep. Sch. Dist.,* 80 F.3d 1006 (5th Cir. 1996); *Davis,* 120 F.3d 1390 (11th Cir. 1997) (*en banc*). Three peer harassment cases currently are pending in the Second, Third, and Tenth circuit courts of appeal: *Bruneau v. South Kortright School District,* 962 F. Supp. 301 (N.D.N.Y. 1997), *appeal filed,* No. 97-7495 (2d Cir. Apr. 23, 1997); *Linson v. University of Pennsylvania,* 1996 WL 637810 (E.D. Pa. 1996), *appeal filed,* No. 97-1055 (3d Cir. Dec. 10, 1996); *Murrel v. School District No. 1,* No. 95-CV2882 (D. Colo. 1997), *appeal filed,* No. 97-1055 (10th Cir. Feb. 10, 1997).

This Court recently provided much-needed guidance regarding sexual harassment in the employment context under Title VII. *See Faragher v. City of Boca Raton,* 118 S. Ct. 2275 (1998); *Burlington Indus. v. Ellerth,* 118 S. Ct. 2257 (1998); *Oncale v. Sundowner Offshore Servs.,* 118 S. Ct. 998 (1998). Similar clarity for students is necessary now. As this Court has recognized, sexual harassment of students "unfortunately is an all too common aspect of the educational experience," *Gebser,* 118 S. Ct. at 2000. The liability standard governing a particular school in a Title IX peer sexual harassment case varies, and will continue to vary widely depending on where the school is located. Lower courts have evidenced great difficulty in resolving sexual harassment principles without Supreme Court guidance.

Accordingly, Supreme Court review is essential to clarify the legal standards governing Title IX peer sexual harassment claims, and, in so doing, to provide students with the sorely needed protection which currently is not available uniformly across the country.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARCIA D. GREENBERGER
VERNA L. WILLIAMS *
NEENA K. CHAUDHRY
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180
Attorneys for Petitioner

August 7, 1998

* Counsel of Record